



Tulane Environmental Law Clinic

December 15, 2016

*By Certified Mail No. 70151730000187271417*

Gina McCarthy, Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

*By Certified Mail No. 70151730000187271424*

Nancy Stoner, Acting Assistant Administrator  
U.S. Environmental Protection Agency  
Office of Water  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Re: Potential Unreasonable Delay Lawsuit—September 10, 2015 Ouachita Riverkeeper  
Petition for Determination that Revised Water Quality Standards are Necessary for  
Coffee Creek and Mossy Lake in Arkansas

Dear Administrator McCarthy and Ms. Stoner,

Attached, please find a *draft* complaint for an “unreasonable delay” lawsuit under the APA. We are providing the complaint in draft form to stress our concern about EPA’s failure to respond to a Petition that the Ouachita Riverkeeper submitted to EPA on September 10, 2015. The Petition asks EPA to determine that revised water quality standards are necessary for Coffee Creek and Mossy Lake in Ashley County, Arkansas, to meet the Clean Water Act’s requirements.<sup>1</sup> As of the date of this letter, we have not received a response to the Petition. In short, EPA has failed to respond to the Petition for more than fifteen months, which the Ouachita Riverkeeper believes to be an unreasonable delay.

We request that EPA contact us as soon as practical to establish a deadline for an EPA response to the Ouachita Riverkeeper petition for unreasonable delay.

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<sup>1</sup> The Ouachita Riverkeeper further describes the resulting damage to the public and environment in a complaint to EPA’s Office of Civil Rights: [http://www.tulane.edu/~telc/assets/petitions/4-26-16\\_%20Environmental\\_Justice\\_%20Petition%20-%20Georgia-Pacific\\_NPDES\\_Permit.pdf](http://www.tulane.edu/~telc/assets/petitions/4-26-16_%20Environmental_Justice_%20Petition%20-%20Georgia-Pacific_NPDES_Permit.pdf), and in a response to Georgia Pacific’s letter regarding that complaint: [http://www.tulane.edu/~telc/assets/petitions/11-3-16\\_Resp\\_to\\_GP\\_Ltr\\_re\\_EJ%20Pet\\_Crossett.pdf](http://www.tulane.edu/~telc/assets/petitions/11-3-16_Resp_to_GP_Ltr_re_EJ%20Pet_Crossett.pdf).

Gina McCarthy, Administrator  
Potential Unreasonable Delay Lawsuit re Revised Water Quality Standards  
December 15, 2016  
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Prepared by:



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Sincerely,



Adam Babich  
Elizabeth Livingston de Calderón  
*Counsel for the Ouachita Riverkeeper*

Cc:

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Lilian Dorka, Acting Director, EPA Office of Civil Rights, Mail Code 1210A, 1200  
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DRAFT

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

OUACHITA RIVERKEEPER	*
A non-profit organization headquartered	*
in Calhoun, Louisiana	*
167 Thorn Drive	*
Calhoun, Louisiana 71225	*
	*
Plaintiff,	*
	*
v.	*
	*
UNITED STATES ENVIRONMENTAL	*
PROTECTION AGENCY	*
1200 Pennsylvania Ave. NW	*
Washington, DC 20460,	*
	*
Defendant.	*

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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**I. INTRODUCTION**

1. Ongoing EPA delay allows Georgia Pacific, LLC to use Coffee Creek and Mossy Lake in West Crossett, Arkansas, as the company's wastewater treatment system. Each day, Georgia Pacific uses these public waters to treat and transport about 45 million gallons of wastewater. This untreated waste flows through a majority African-American area in the community of West Crossett, Arkansas, subjecting the community to harmful pollution and denying community members the opportunity to use Coffee Creek. These harmful discharges

continue because EPA has failed to set water quality standards for Coffee Creek and Mossy Lake that are necessary to implement the Clean Water Act.

2. On September 10, 2015, the Ouachita Riverkeeper submitted a petition to EPA, asking the agency to begin the process of setting water quality standards for Coffee Creek and Mossy Lake by making a determination that new or revised standards are necessary to meet the Clean Water Act's requirements. More than fifteen months have passed since that petition was filed; yet EPA has not responded. Because EPA's delay is unreasonable, the Ouachita Riverkeeper respectfully requests a Court order to compel EPA to respond.

## **II. JURISDICTION AND VENUE**

3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the case presents a federal question under 33 U.S.C. § 1313(c)(4), 5 U.S.C. § 706(1) (Administrative Procedure Act), and 28 U.S.C. § 2201 (declaratory judgment statute).

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1), because the EPA resides in the District of Columbia.

## **III. PARTIES**

5. Plaintiff Ouachita Riverkeeper, Inc. is a non-profit corporation organized under the laws of Louisiana. It is a Waterkeeper Organization and part of the Waterkeeper Alliance, which is a grassroots advocacy organization consisting of nearly 200 Waterkeeper Organizations dedicated to preserving and protecting the world's waters. Ouachita Riverkeeper is dedicated to protecting, restoring, and advocating for the protection of the Ouachita River watershed. In its work to protect the Ouachita River watershed, Ouachita Riverkeeper helps to ensure compliance with laws and regulations intended to preserve and enhance natural resources and environmental quality in the area. This lawsuit is germane to the Ouachita Riverkeeper's purpose.

6. Members of the Ouachita Riverkeeper use and enjoy the Ouachita River and have a recreational and aesthetic interest in the river. Low water quality standards in Coffee Creek and Mossy Lake degrade and foul the Ouachita River, which interferes with Plaintiff's members use and enjoyment of the river. Plaintiff's members have curtailed activities that they would otherwise enjoy, derive less enjoyment from other activities, and suffer reasonable concerns and anxiety about the potential for future harm.

7. Members of the Ouachita Riverkeeper live on or near Coffee Creek and Mossy Lake. Low water quality standards in Coffee Creek and Mossy interfere with Plaintiff's members use and enjoyment of those water bodies. Plaintiff's members have curtailed activities that they would otherwise enjoy, derive less enjoyment from other activities, and suffer reasonable concerns and anxiety about the potential for future harm.

8. EPA's failure to timely respond to the Plaintiff's 2015 Petition to determine that revised water quality standards are necessary in Coffee Creek and Mossy Lake is a cause of and extends the Plaintiff's members' injuries. This is because an EPA determination that revised water quality standards are necessary in Coffee Creek and Mossy Lake would trigger a requirement for revised standards under 33 U.S.C. § 1313(c)(4).

9. EPA's unreasonable delay violates Plaintiff's right under the Administrative Procedure Act (APA) to a response to its 5 U.S.C. § 553(e) petition. This failure harms Plaintiff's concrete organizational interests by impeding their ability as a public interest non-profit organization to facilitate public involvement in governmental decision-making. Further, EPA's continued failure to respond to the 2015 Petition deprives Plaintiff of a decision on the Petition's merits, and, if necessary, the opportunity to seek judicial review of EPA's final decision.

10. Defendant EPA is an “agency” for the purpose of the APA. *See* 5 U.S.C. §§ 551(1), 701(b)(1). EPA is tasked with the primary responsibility under Clean Water Act to protect the waters of the United States from pollution.

#### IV. BACKGROUND

11. On September 10, 2015, Petitioner the Ouachita Riverkeeper, Inc. petitioned EPA to determine that revised or new water quality standards are necessary for Coffee Creek and Mossy Lake, in Ashley County, Arkansas to meet the Clean Water Act’s requirements. Plaintiff submitted the 2015 Petition pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(e).

12. The Plaintiff has also petitioned and written EPA’s Office of Civil Rights about a related issue, pursuant to 40 C.F.R. Part 7. *See* April 26, 2016 Petition and November 3, 2016 Letter, [http://www.tulane.edu/~telc/assets/petitions/4-26-16\\_%20Environmental\\_Justice\\_%20Petition%20-%20Georgia-Pacific\\_NPDES\\_Permit.pdf](http://www.tulane.edu/~telc/assets/petitions/4-26-16_%20Environmental_Justice_%20Petition%20-%20Georgia-Pacific_NPDES_Permit.pdf) and [http://www.tulane.edu/~telc/assets/petitions/11-3-16\\_Resp\\_to\\_GP\\_Ltr\\_re\\_EJ%20Pet\\_Crossett.pdf](http://www.tulane.edu/~telc/assets/petitions/11-3-16_Resp_to_GP_Ltr_re_EJ%20Pet_Crossett.pdf).

13. The Clean Water Act’s objective “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Congress intended the Act’s implementation to provide “for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved.” 33 U.S.C. § 1251(a)(2).

14. Water quality standards under the Act include “designated uses” and “water quality criteria” to protect those uses. *See id.* § 1313(c)(2)(A).

15. Water quality standards must “reflect the uses actually being attained.” 40 C.F.R. § 131.10(i). “Existing uses are those uses actually attained in the water body ... whether or not they are included in the water quality standards.” *Id.* § 131.3(e). “Existing instream water uses ...

shall be maintained and protected.” *Id.* § 131.12(a)(1). EPA Guidance explains, “protecting ‘existing uses,’ provides the absolute floor of water quality in all waters of the United States.”

*See* EPA Water Quality Standards Handbook, Ch. 4.2, (2014).

16. Exemption of waters of the United States from attainable uses should not be maintained if “[t]hey are existing uses” or if the “uses will be attained by implementing effluent limits” such as those enforceable under a Clean Water Act § 402 permit. *See* 40 C.F.R § 131.10(h). A state may only remove a designated use, which is not an existing use if the State can demonstrate that attaining the designated use is not feasible for a limited set of reasons. *See id.* § 131.10 (g). Infeasibility does not include “human caused” pollution that can be “remedied” and would not “cause more environmental damage to correct than to leave in place.” *See id.* § 131.10(g)(3).

17. Coffee Creek and Mossy Lake are waters of the United States located in Arkansas’ Gulf Coastal Ecoregion near Crossett, Arkansas. After flowing through Mossy Lake, Coffee Creek flows into the Ouachita River approximately two miles north of the Louisiana border.

18. Arkansas’s current water quality standards exempt Coffee Creek and Mossy Lake from aquatic life uses and primary contact recreation uses, as well as other water quality standards.

19. The 2015 Petition explained, among other things, that a 2007 EPA use attainability analysis found that aquatic life use was potentially available, and EPA published its finding on its website, recommending Coffee Creek and Mossy Lake warrant an aquatic life use designation.

20. The 2015 Petition explained, among other things, that Coffee Creek and Mossy Lake qualify for primary contact recreation use designation under Arkansas' Gulf Coastal Ecoregion standard that includes "all streams with watersheds greater than 10 mi<sup>2</sup> and all lakes/reservoirs." *See* Arkansas Pollution Control and Ecology Commission Regulation No. 2, at A-29.

21. Although current water quality standards exempt Coffee Creek and Mossy Lake from aquatic life and primary contact recreation uses, Arkansas does not have a complete use attainability analysis available as a basis for those exemptions from Clean Water Act § 101(a)(2) uses.

## **V. CAUSE OF ACTION**

22. Pursuant to the Administrative Procedure Act (APA), "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e).

23. The APA provides that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). Pursuant to the APA, "agency action" includes an agency's "failure to act." 5 U.S.C. § 551(13).

24. The APA authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706 (1).

25. Plaintiff petitioned EPA on September 10, 2015 urging EPA to determine that revised water quality standards are necessary for Coffee Creek and Mossy Lake to meet the Clean Water Act's requirements under 33 U.S.C. § 1313(c)(4). The Plaintiff submits an accurate copy of the 2015 Petition as Exhibit A to this Complaint.



26. More than fifteen months have passed since Plaintiff filed their legal Petition, yet EPA still has not formally responded to the 2015 Petition.

27. EPA has unreasonably delayed taking action on Plaintiff's 2015 Petition.

## **VI. REQUEST FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that this Court:

- A. Declare that EPA has violated the APA by failing to respond to the 2015 Petition;
- B. Order EPA to respond to the 2015 Petition within 90 days;
- C. Award Plaintiff attorneys' fees and all other reasonable expenses incurred in this action, pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412(d); and
- D. Grant such further relief as the Court deems just and proper.

Dated: DRAFT

Respectfully submitted by:

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